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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6257

TROY LEON GREGG,

Petitioner,

—v.—

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Statement of Interest of the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

(1) The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

(2) The experience of Legal Defense Fund attorneys in handling capital cases over a period of many years convinced us that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged. Further study and reflection led us to the conclusion that the evil of discrimination was not merely adventitious, but was rooted in the very

nature of capital punishment. Accordingly, in 1967, the Legal Defense Fund undertook to represent all condemned men in the United States, regardless of race, for whom adequate representation could not otherwise be found. Additionally, the Fund provided consultative assistance to attorneys representing a large number of other condemned defendants.

(3) Since this Court's decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Legal Defense Fund has continued to provide legal assistance to indigent condemned prisoners of all races. Fund attorneys now represent on appeal more than one hundred death-sentenced defendants. Among these are a number of prisoners condemned under Georgia's 1973 death penalty statutes; and we have filed certiorari petitions in this Court on behalf of six such prisoners. *Eberheart* v. *Georgia,* No. 74-5174; *House* v. *Georgia,* No. 74-5196; *Hooks* v. *Georgia,* No. 74-5954; *Ross* v. *Georgia,* No. 74-6207; *McCorquodale* v. *Georgia,* No. 74-6557; *Coker* v. *Georgia,* No. 75-5444.

(4) The Court's decision in the instant case may resolve the constitutional issues upon which the lives of these six men and our other Georgia clients depend.

(5) Consent has been given by petitioner and respondent for the filing of this brief *amicus curiae.*

Question Presented

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions Involved

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

2. This case further involves the following provisions of the Code of Georgia:

Ga. Code Ann. §*26-1101 (1972)*

> "*Murder.* (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. §*26-1311 (1972)*

> "*Kidnapping.* (a) A person commits kidnapping when he abducts or steals away any person without

lawful authority or warrant and holds such person against his will.

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1902 (1972)

"Armed robbery. A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2001 (1972)

"Rape. A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. §26-2201 (1972)

"Treason. A person owing allegiance to the State commits treason when he knowingly levies war against the State, adheres to her enemies, or gives them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court. When the overt act of treason is committed outside this State, the person charged therewith may be tried in any county in this State. A person convicted of treason shall be punished by death, or by imprisonment for life or for not less than 15 years."

Ga. Code Ann. §26-3301 (1972)

"Definition: punishment; continuing offense; jurisdiction.

A person commits hijacking of an aircraft when he (1) by use of force; or (2) by intimidation, by use of threats or coercion, places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another, causes the diverting of an aircraft from its intended destination to a destination dictated by such person. A person convicted of hijacking an aircraft shall be punished by death or life imprisonment. The offense of hijacking is declared to be a continuing offense from the point of beginning and jurisdiction to try a person accused of the offense of hijacking shall be in any county of Georgia over which the aircraft is being operated.

Ga. Code Ann. §26-3102 (1975 Supp.)

"Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence

of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1975 Supp.)[1]

"Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2512 (1972)

"Electrocution substituted for hanging; place of execution. All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death shall suffer such punishment by electrocution instead of hanging."

Ga. Code Ann. §27-2514 (1975 Supp.)

"Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses. Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment, it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two

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[1] At the time of petitioner's trial, Ga. Code Ann. §27-2302 provided:

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

"When the verdict is guilty without a recommendation to mercy it shall be legal and shall mean that the convicted person shall be sentenced to death. However, when it is shown that a person convicted of a capital offense without a recommendation to mercy had not reached his seventeenth birthday at the time of the commission of the offense the punishment of such person shall not be death but shall be imprisonment for life."

Sec. 27-2302 was part of Georgia's capital-sentencing laws before *Furman* v. *Georgia*, and was not amended by the 1973 statute, whose provisions (Ga. Code Ann. §§26-3102, 27-2534.1(c)) were consistent with it. The present language is the result of a 1974 amendment. Ga. Laws, 1974, p. 353, Act. No. 854. See Editorial Comment to Ga. Code Ann. §27-2302 (1975 Supp.).

days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any fines on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1 (1975 Supp.)

"*Mitigating and aggravating circumstances; death penalty.* (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful ar-

rest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1975 Supp.)

"*Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure

of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Ga. Laws, 1973, p. 159, 162, Act. No. 74[3]

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a

[3] This section was modified in certain respects by Ga. Laws, 1974, pp. 355-358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. §27-2503. These modifications were insubstantial with respect to the trial of capital felonies.

verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court

is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Ga. Code Ann. §27-2528 (1975 Supp.)

"*Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death.* Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

Statement of the Case

Petitioner Troy Leon Gregg was indicted by a Gwinnett County, Georgia, grand jury, upon two counts of murder and two counts of armed robbery for the November 21, 1973 killings of Fred Edward Simmons and Bob Durwood ("Tex") Moore. The indictments alleged that Gregg "unlawfully with malice aforethought" killed each of the victims "by shooting [him] . . . with a certain pistol" (T. 424, 425), and that "with the intent to commit theft" he did "take from the person" of the two victims "A red and white 1960 Pontiac, Florida Tag Number 7W85381" and "Four hundred dollars" "by the use of a certain pistol, . . . an offensive weapon . . . ." (T. 424, 425).

On November 21, 1973 petitioner was hitchhiking from St. Cloud, Florida to his home in Ashville, North Carolina, accompanied by one Floyd Ralford "Sam" Allen. (T. 122, 309-311). They were picked up just outside of St. Cloud by two men, Fred Simmons and Bob Moore, in a 1960 Ford. (T. 312.) Though it was early morning, Moore and Simmons had been drinking, and after a few miles asked petitioner Gregg to drive. (T. 313.)

Gregg complied, but after some distance, the Ford broke down. (T. 313.) A passing Florida Highway Patrolman, Daniel James Cobb, saw the disabled vehicle and called a wrecker. Leaving Gregg and Allen at the site of the breakdown, the patrolman then took Simmons and Moore to a used car dealer in nearby Winter Garden, where Simmons purchased another car, a 1960 red and white Pontiac. (T. 209-210.) Trooper Cobb noticed that Moore had what "looked like a considerable amount of money" at the time of the purchase. (T. 212.)

Simmons and Moore returned to pick up Gregg and Allen, and the four continued north, again with Gregg driving. (T. 314.) In northern Florida they encountered another hitchhiker, Dennis Weaver, who rode with them until they reached his destination, Atlanta, at approximately eleven o'clock that evening. (T. 120-130.) Weaver testified that during this time there was no evidence of hostility among the men in the car, though Moore and Simmons were drinking heavily (T. 125-126), and though he was frightened by Simmons' and Moore's talk about their jail experiences and by "the situation" (T. 146-147).

After letting Weaver out, the four men continued northward into Gwinnett county to the intersection of I-85 and Georgia Highway 20, where Moore and Simmons asked Gregg to stop the car so they could relieve themselves.

(T. 319.) Their bodies were found there early the next morning. (T. 221.) Autopsies showed that both men had died of gunshot wounds to the head from a small caliber pistol. (T. 92, 96.) Moore had been shot once in the right cheek and once in the back of the head (T. 92), Simmons once near the right temple (T. 97). Both men had several bruises and abrasions of unknown origin about the face and head (T. 95, 107-110),[3] and both bodies had blood alcohol contents indicating that the two men were heavily intoxicated at the time of death (T. 101).

On November 23, Dennis Weaver read in an Atlanta newspaper about the discovery of the dead men and contacted the Gwinnett County Police Department. (T. 131-133.) He told the police of his contact with the four men two days before, gave them a description of Gregg and Allen and of Simmons' Pontiac, and gave them his impression that their destination was Ashville, North Carolina. (T. 134, 239.) Based on this information the police broadcast a description of the car and suspects (T. 239), which resulted in petitioner's arrest at three o'clock the

[3] Dr. James Bryan Dawson, who performed the autopsies, was unable to determine whether these minor injuries were incurred before or after the gunshot wounds, though as to Simmons he was able to say they were inflicted "not earlier than two to three hours before" death. (T. 104-105, 109-110.) He noted that the wounds were all "consistent with the face of the subject having been dragged or pushed along . . . a surface" similar to the embankment next to which the bodies were found. (T. 112.) He agreed that some of the injuries, to Simmons, at least, could have resulted from a fight (T. 102, 105), but concluded that they "were probably sustained from a fall into this ditch." (T. 105.) Dr. Dawson also testified that he found dried blood on Moore's right hand that "was not like the remainder of the dried blood that was found on the face . . . or around the body" (T. 106), but which he did not analyze (*ibid.*), though he "particularly looked for signs of injuries to the hands which might have suggested that there was some sort of altercation or . . . defense . . . and found nothing on either one of the subject's hands, which suggested that this might have taken place" (T. 110).

next afternoon. (T. 164-165.)[4] At the time of his arrest Gregg was driving the 1960 Pontiac which Simmons had purchased (T. 165, 169), and had in his pocket $107.00 in cash and a pistol later shown to be that which killed Moore and Simmons (*ibid.*). A search of the car incident to this arrest produced Simmons' bill of sale for the car. (T. 168.)

Gregg was given *Miranda* warnings about five minutes after he was stopped (T. 170-171), and signed a written waiver of his rights at 3:17 p.m. (T. 516). He was not interrogated until eleven o'clock that evening, when he told Detective Bert H. Blannott of the Gwinnett County Police that "he understood his rights" (T. 281),[5] and made a partially exculpatory statement. He admitted shooting Simmons and Moore, but claimed to have done it in self-defense. (T. 282-283.) In the statement, which he read and signed (T. 322), Gregg said that Moore and Simmons were "going to put me and Sam out" and "wouldn't give us our clothes and stuff and we got in a fight." (T. 518.)

> "Fred smacked me down a bank and then him and Tex both jumped on Sam. Fred had some kind of pipe and I backed up and fell in the ditch again. One of them had a knife and I wasn't about to let either one of them cut me. . . . I shot Fred to keep him off of me and I shot Tex twice. Then we took about four or five hundred dollars off them and left in their car."

[4] The constitutionality of this warrantless arrest for "investigation" (T. 183), and the admissibility of its fruits, was the subject of considerable dispute at trial (T. 183-203), and a ground of Gregg's appeal.

[5] The *Miranda* warnings that had been given prior to 3:17 p.m. were not repeated before the 11:00 p.m. interrogation. (T. 297.)

(*Ibid.*) Shortly after the conclusion of his statement, however, when Ashville police officer William Gibson asked Gregg "why he shot these people," Gregg answered "by God I wanted them dead" (T. 379).

At approximately one o'clock on November 25, Gregg (together with Allen) was removed from Ashville to Lawrenceville, Georgia, by the Gwinnett County Police and District Attorney. (T. 284.) At approximately 5:00 they stopped at the scene of the killings "to establish in our own minds with the help of the defendants just exactly [what] had taken place." (T. 290.) All of the parties got out of the cars, and Detective Blannott asked Allen, in Gregg's presence, what had happened. (T. 286.) According to Blannott's testimony:

> "Sam [Allen] told us as soon as [Simmons and Moore] . . . got out, Troy [Gregg] turned around and told him, he said, get out, we're going to rob them. Sam told us that he got out and walked toward the back of the car and looked around and could see Troy at the car, with a gun in his hand, laying up on the car, so he could get a good aim, the two men had gone down the bank and had relieved themselves and as they were coming back up the bank, according to Say [sic], Troy fired three shots, one of the men fell, the other staggered, Troy then circled back around the back, or rear of the car and approached the two men, both of which were now laying in the ditch. He placed the gun to ones [sic] head and pulled the trigger then went quickly to the other one and placed the gun to his head and pulled the trigger again, he then took the money, whatever contents were in their pockets, he told Sam, to get in the car and they drove away."

(T. 287.) Blannott testified that Gregg was then asked "if that was how it happened" and said "yes, it was." (*Ibid.*)

> "Chief Crunkleton then asked him . . . 'you mean you shot these men down in cold blooded murder just to rob them' and Troy replied, 'yes,' and Chief asked him why and he said he didn't know."

(T. 288.)

Petitioner's trial began February 4, 1974. A jury was selected,[6] and four days of proceedings were held. The State's evidence is summarized above.[7] Petitioner was the sole witness in his own behalf. He testified at trial, as he had claimed when first interrogated following his arrest, that he had shot Moore and Allen in self-defense and defense of Allen. (T. 320.)[8] On cross-examination the State produced a letter written by Gregg to Allen asking Allen to renounce his previous statements and provide a "Statement for you" containing a version of the killings consistent with Gregg's trial testimony. (T. 350-354, 521-528.) Gregg

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[6] Three veniremen were challenged by the state and excused by the court without objection because of their affirmative answers when asked if they would "vote against imposition of the death penalty without regard to any evidence that might be developed at the trial of the case." (T. 2, 3, 31.)

[7] "Sam" Allen did not testify at Gregg's trial, but his statement in Gregg's presence was recounted (T. 286), and he appeared in court to be identified (T. 138). The murder charges pending against him at the time were "nol prossed" when he pled guilty to the robbery counts, receiving concurrent twenty-year sentences, six weeks later. See *State* v. *Floyd Allen,* Gwinnett County Superior Court, Indictment #9475.

[8] Petitioner admitted making the signed statement containing his earlier claim of self-defense (T. 322), but denied agreeing with Allen's version of the facts at the scene of the killings. (T. 323, 350). He also denied Officer Gibson's testimony that he had said he shot Moore and Simmons because "I wanted them dead." (T. 381.) He said that he had not taken any money from the dead men (T. 346), but suggested that Allen may have done so. He testified that Allen had paid for everything that the two men had purchased after the killings (T. 329-330), and that Gregg had been given the money found on him at the time of his arrest as repayment of a loan after his return to Ashville. (T. 331-336.)

admitted writing parts of the letter but denied writing others. (*Ibid.*) In rebuttal the State called a document examiner who testified that the whole letter was written by Gregg. (T. 361.)

The trial judge submitted the murder charge to the jury on both felony-murder and non-felony-murder theories. (T. 428-429.) It instructed on the issue of self-defense raised by petitioner's testimony (T. 430-431) but declined to instruct on manslaughter (T. 451). On the murder counts, it therefore authorized the jury to return verdicts of guilty or not guilty (T. 441); and on the robbery counts it authorized verdicts of guilty of armed robbery, guilty of robbery by intimidation, or not guilty (*Ibid.*). The jury returned verdicts of guilty on all four counts. (T. 453.)

A pre-sentence hearing was conducted the same day. No evidence was offered at that hearing (T. 459), but counsel for both sides made lengthy arguments, dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. (T. 459-477.)

The court charged the jury that it could recommend either a death sentence or a prison sentence upon each count. (T. 478.) It further charged that, in order to recommend a death sentence upon any count, the jury first had to find true beyond a reasonable doubt one of three aggravating circumstances:

> "One—That the offense . . . was committed while the offender was engaged in the commission of two other capitol [sic] felonies, to wit [the armed robbery or murder of Simmons and Moore]. . . .
>
> Two—That the offender committed the offense . . . for the purpose of receiving money and the automobile described in the indictment.

> Three—The offense . . . was outrageously and wantonly vile, horrible and inhuman, in that [it] . . . involved the depravity of the mind of the defendant."

(T. 478, 479.) The jury was told that it could consider "the facts and circumstances in mitigation and aggravation." (T. 480.) "Mitigating circumstances" were defined as

> "those which do not constitute a justification of [sic] excuse for the offense in question, but which, in fairness and mercy maybe [sic] considered as a extinuating [sic] or reducing the degree of moral culpability of punishment [sic]."

(T. 480.) "Aggravating circumstances" were defined as

> "those which increase the guilt or innormity [sic] of the offense or add to its injurious consequences."

(Ibid.)

The jury recommended a death sentence on each count. (T. 483-485.) It found true, as to each count, all but the third "aggravating circumstance." (*Ibid.*) The court accordingly imposed four death sentences upon petitioner.

How the Federal Question Was Raised and Decided Below

In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 3 asserted that:

> "The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

On the authority of *Coley* v. *State,* 231 Ga. 829, 204 S.E. 2d 612 (1974); *House* v. *State,* 232 Ga. 140, 205 S.E.2d 217 (1974) and *Eberheart* v. *State,* 232 Ga. 247, 206 S.E.2d 12 (1974), a majority of the Supreme Court of Georgia affirmed petitioner's sentences of death for the crime of murder, *Gregg* v. *State,* 233 Ga. 117, 210 S.E.2d 659 (1974), one judge dissenting on the ground that the Georgia death penalty statutes are unconstitutional, *id.* at 668 (opinion of Mr. Justice Gunter, concurring and dissenting). The death sentences imposed for the crime or armed robbery were vacated on the grounds that the penalty was rarely imposed for that offense and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. *Id.* at 667.

An application for rehearing, in which petitioner again challenged the constitutionality of his death sentences, was denied. Order dated October 29, 1974.

Summary of Argument

I

Georgia's 1973 capital punishment statute provides a bifurcated trial procedure for selecting some convicted capital offenders to be killed while others live. The statute has been upheld by the Supreme Court of Georgia over the objection that it "permits the exercise of a discretion that extinguishes one man's life and permits another man to live, both of whom have committed exactly the same crime." *Coley* v. *State,* 231 Ga. 829, 204 S.E.2d 612, 620 (opinion of Mr. Justice Gunter, concurring and dissenting). Experience to date in the administration of the statute confirms that life sentences and death sentences may be and are imposed "with no meaningful basis for distinguishing" the people who get them. *Furman* v. *Georgia,* 408 U.S. 238, 313 (1972) (concurring opinion of Mr. Justice White). Detailed examination of the new statute and its use demonstrates that, far from assuring regularity, it merely perpetuates the arbitrariness condemned in *Furman.*

The explicit capital sentencing discretion is itself only one of several mechanisms by which an arbitrary fraction of death-eligible offenders is selected to be actually put to death. Prosecutorial charging and plea-bargaining discretion, jury discretion to convict of one or another amorphously distinguished "capital" or non-capital crime, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable. In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitutional cruel and unusual punishment within the fundamental historical concerns of the Eighth Amendment.[9]

II[10]

The continuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-indivious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none

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[9] These concerns are documented in the Brief for Petitioner in *Fowler* v. *North Carolina,* No. 73-7031, at pp. 26-45, and we do not repeat that documentation in the present brief.

[10] This point incorporates by reference the submissions made in petitioners' briefs in *Fowler* v. *North Carolina,* No. 73-7031 and *Jurek* v. *Texas,* No. 75-5394.

begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

I

Introduction

In 1972, this Court held "that the imposition and carrying out of the death penalty" in two Georgia cases "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman* v. *Georgia*, *supra*, 408 U.S. at 239.[11] Contemporaneously with that decision, the Court summarily vacated death sentences in a number of other Georgia cases on the authority of *Furman* —sentences imposed under the pre-1969 sentencing system involved in the *Furman* case itself,[12] under the slightly different system created by the 1968 Criminal Code of Georgia,[13] and under a bifurcated trial procedure enacted in 1970.[14] The Georgia Supreme Court subsequently recognized that *Furman* had invalidated all of the State's death penalty laws.[15]

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[11] The companion Georgia case of *Jackson* v. *Georgia* was decided by the same order.

[12] *Arkwright* v. *Georgia*, 408 U.S. 936 (1972); *Miller* v. *Georgia*, 408 U.S. 938 (1972); *Walker* v. *Georgia*, 408 U.S. 936 (1972); *Cummings* v. *Georgia*, 408 U.S. 935 (1972); *Lee* v. *Georgia*, 408 U.S. 936 (1972); *Manor* v. *Georgia*, 408 U.S. 935 (1972); *Park* v. *Georgia*, 408 U.S. 935 (1972); *Sullivan* v. *Georgia*, 408 U.S. 935 (1972); *Thacker* v. *Georgia*, 408 U.S. 936 (1972).

[13] *Henderson* v. *Georgia*, 408 U.S. 938 (1972).

[14] *Jackson* v. *Georgia*, 409 U.S. 1122 (1972); *Williams* v. *Georgia*, 408 U.S. 936 (1972).

[15] *See, e.g., Sullivan, et al.* v. *State*, 229 Ga. 731, 194 S.E.2d 411 (1972); *Mitchell* v. *Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972); *Massey* v. *State*, 229 Ga. 846, 195 S.E.2d 28 (1972); *Grantling* v. *State*, 229 Ga. 746, 194 S.E.2d 405 (1972); *Callahan* v. *State*, 229 Ga. 737, 194 S.E.2d 431 (1972); *Sirmans* v. *State*, 229 Ga. 743, 194 S.E.2d 476 (1972); *McCrary* v. *State*, 229 Ga. 733, 194 S.E.2d 480 (1972); *Jackson* v. *State*, 230 Ga. 181, 195 S.E.2d 921 (1973); *Wilburn* v. *State*, 230 Ga. 675, 198 S.E.2d 857 (1973). In *Watson* v. *State*, 229 Ga. 787, 194 S.E.2d 407 (1972), the Court stated flatly that "the imposition of the death penalty under present Georgia statutes is unconstitutional." 194 S.E.2d at 407.

The Georgia Legislature reacted in 1973 by enacting a capital sentencing scheme which requires that one or more specified "aggravating circumstances" be found as a precondition to the imposition of a death sentence.[16] Georgia Laws 1973, p. 159, No. 74 (effective March 28, 1973). After a jury or a judge renders a verdict or finding of guilty

[16] No "aggravating circumstances" are required, however, to support a death sentence for the crimes of treason and aircraft hijacking. The death penalty laws enacted in 1973 are set forth at pages 5-14 *supra*. Section 26-3102 was modified by the addition of the italicized passages:

> "*Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes *a finding of at least one statutory aggravating circumstance and* a recommendation that such sentence be imposed. Where a *statutory aggravating circumstance is found and* a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case *makes a finding of at least one statutory aggravating circumstance and* recommends the death sentence in its verdict, the court shall not sentence the defendant to death, *provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking.* The provision of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Section 26-3102 and 27-2534.1 provided for consideration of aggravating and mitigating circumstances, and §27-2534.1(b) set forth some of the aggravating circumstances to be considered. Section 27-2537 provided for appellate review of sentences of death. Section 27-2528 dealt with sentencing following a plea of guilty to an offense punishable by death.

or after a plea of guilty to the offenses of murder, armed robbery, rape, kidnapping, treason or aircraft hijacking,[17] a pre-sentence hearing is to be conducted before the jury or judge. At this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of such prior convictions and pleas." Ga. Laws 1973, p. 162, Act. No. 74.[18] The State may present only such evidence in aggravation as it has made known in advance to the defendant. Ga. Laws 1973, p. 162, Act. No. 74.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b). The "statutory aggravating circumstances" are:

> "(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or

[17] These crimes—and the crime of capital perjury, see former Ga. Code Ann. §26-2401 (1972)—carried a possible death penalty prior to the 1973 legislation; their definitions were not changed in 1973.

[18] The statutory language governing proof of aggravating and mitigating circumstances at pre-sentence hearings in capital trials was not changed in 1973. Compare former Ga. Code. Ann. §27-2534 (1972).

> aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit or committed murder as an agent or employee of another person.
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10 The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

Ibid. Additional "aggravating circumstances otherwise authorized by law" are not identified. "Mitigating circumstances" are not enumerated or defined.[19]

The jury *may*—but need not—impose a death sentence when it finds beyond a reasonable doubt one "statutory aggravating circumstance." Ga. Laws 1973, p. 162, Act. No. 74. For to condemn a defendant, it must also make a "recommendation of death."[20] Ga. Code Ann. §27-2534.1(c). See Ga. Code Ann. §26-3102.[21]

Provision is made for the filing of a standardized form "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court. Ga. Code Ann. §27-2537. General guidelines for review by that court are provided,[22] and the court is empowered to affirm the death sentence or to set it

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[19] The Act does, however, provide that evidence of the absence of prior criminal convictions or pleas may be heard at the penalty trial. Ga. Laws 1973, p. 162, Act No. 74.

[20] See pages 33-34, *infra*.

[21] See note 16, *supra*.

[22] The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed, and to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. §27-2537(c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. §27-2537(e).

aside and remand the case for resentencing. *Ibid.* Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

In the following Part II we will establish, through an analysis of the unquestionably discretionary procedures by which Georgia capital defendants are still prosecuted and sentenced, that the constitutional infirmities condemned in *Furman* v. *Georgia* remain. *Cf. Lane* v. *Wilson,* 307 U.S. 268, 275 (1938). In Part III we will address the question whether the execution of a human being who has been condemned through such procedures can be thought consistent with Eighth Amendment standards of decency.

II

The Arbitrary Infliction of Death

A. *At the Pre-Sentence Hearing.*

1. Georgia's 1973 Death Penalty Legislation Is Explicitly Discretionary.

We start with the observation that Georgia's post-*Furman* capital sentencing procedure remains avowedly discretionary. In *Coley* v. *State,* 231 Ga. 829, 204 S.E.2d 612 (1974), the Supreme Court of Georgia addressed the constitutionality of the 1973 death penalty laws, and said:

> "The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. After all, some discretion is inherent in any system of justice, from arrest to final review."

Id. at 615. The Court concluded that "the system of dispensation of the death penalty provided by the statute does

not offend the principles of decision of the U.S. Supreme Court in *Furman* and *Jackson*," *id.* at 616, because:

> "[f]irst, the new statute substantially narrows and guides the discretion of the sentencing authority to impose the death penalty and allows it only for the most outrageous crimes and those offenses against persons who place themselves in great danger as public servants. In addition, the new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

The following sections demonstrate, however, that sentencing discretion is neither confined by the provisions of the new statute nor regularized by the process of appellate re-evaluation.

2. The Consideration of Aggravating and Mitigating Circumstances Does Not Control Arbitrariness in the Georgia Capital Sentencing Process.

The process of considering "aggravating" and "mitigating" circumstances does not—and was not intended to—confine the unfettered power of the sentencer to condemn or spare any capital defendant. This is clear for several reasons.

a. *The failure to identify circumstances under which a death penalty is precluded.*

The statute does not preclude a death sentence in any potentially capital case. True, a statutory "aggravating circumstance" is legally required to be found before a defendant can be sentenced to die; and it is doubtless also true that most of the enumerated aggravating circumstances—despite their multiplication,[23] imprecision[24] and breadth[25]—have some limits. But the reach of sub-

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[23] E.g. Ga. Code Ann. §27-2534.1(b)(1) (the defendant had "a prior record of conviction for a capital felony . . . or a substantial history of serious assaultive criminal convictions"); (2) ("the offender was engaged in the commission of another capital felony, or aggravated battery, or . . . burglary or arson in the first degree"); (3) ("The offender . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."); (4) (the murder was committed "for the purpose of receiving . . . any . . . thing of monetary value."); (6) ("The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.").

[24] See pages 35-36, *infra*.

[25] Consider, for example, Ga. Code Ann. §27.2534.1(b)(4) which makes it an aggravating circumstance that murder is committed "for the purpose of receiving money or any other thing of monetary value." This language may sound in contract-killing: at least that is the way the commentators have read the phraseology. Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 Gonzaga L. Rev. 651, 700 n.209 (1974); *Note, Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1600, 1701 n.72 (1974). But contract-killings in Georgia are already covered by Ga. Code Ann. §27.2534.1(b)(6); and the Georgia Supreme Court has affirmed findings of the aggravating circumstances of "monetary value" in cases such as petitioner's, *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974), and *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258, 269 (1975), which were assuredly not contract killings. Nor can subsection 27.2534.1(b)(4) be limited even to the ordinary sort of robbery-murder case in which the robber uses an offensive weapon to achieve his purpose, for *those* cases are covered by subsection 27.2534.1(b)(2). The upshot is that no restriction remains available to limit the evident expansiveness of the words "for the purpose of receiving . . . any . . . thing of monetary value."

section (7), which authorizes a death penalty if the crime was:

> "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"

is, on its face, limitless. Surely any capital crime could be found to involve "depravity of mind." And surely any murder could be found to have involved an "aggravated battery to the victim." [26] Subsection 27-2534.1(b)(2), which makes the concurrent commission of "another capital felony" an aggravating circumstance, functions similarly to aggravate virtually any rape, for the forcible detention and abduction which are usually necessary to the completion of the crime are sufficient to constitute kidnapping, "another capital felony." [27] Since aggravating circumstances can be found in virtually any case of murder or rape,[28] and since the presence of mitigating circumstances does not legally preclude a death sentence,[29] the judge or jury predisposed—for whatever reason—to inflict capital punishment upon any particular defendant may essentially do so at will.

[26] "Aggravated battery" is statutorily defined as:

> "maliciously *caus[ing]* . . . *bodily harm to another* by depriving him of a member of his body, or *by rendering a member of his body useless,* or by seriously disfiguring his body or a member thereof."

Ga. Code Ann. §26-1305 (1972) (emphasis added). Any doubt about the breadth of "aggravated battery" is dispelled by *Mitchell* v. *State,* 234 Ga. 160, 214 S.E.2d 900 (1975), in which the same term from Ga. Code Ann. §27-2534.1(b)(2) was held applicable to the shooting of two victims in a grocery store holdup. Cf. Professor Black's comments on this aspect of the Georgia statute:

> "Since Georgia law defines an 'aggravated battery' as a battery (i.e., attack on the person) which deprives the victim of a member, or of the use of a member, or disfigures him, the concept is a preposterous one when applied to murder; either it is always present in murder, which deprives the victim of the use of all his members, or else it functions absurdly as an 'aggravating circumstance' since it can make little difference to a dead man whether he can lift his right leg."

BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, 66 (1974).

[27] Georgia Code Ann. §26-1311(a) provides that "[a] person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Kidnapping is made capital when, *inter alia,* "the person kidnapped shall have received bodily injury"—an element obviously made out in any rape case.

[28] The term "torture" as used in subsection 27-2534.1(b)(7) seems also to have no perceptible boundaries. In *Floyd* v. *State,* 233 Ga. 280, 210 S.E.2d 810 (1974), the court affirmed a jury finding that a robbery involved "torture" where the victims were each tied up and shot twice in the head, killing them both. *Id.* at 812.

[29] *See, e.g., Moore* v. *State,* 233 Ga. 861, 213 S.E.2d 829, 832 (1975), in which the trial court found some mitigating circumstances, the appellate court "considered" several more, and a death sentence was nonetheless imposed and affirmed.

[30] Of course, it is possible that in some cases juries will not understand this and will believe that a death sentence must be imposed when "aggravating circumstances" are found. See, *e.g.,*

b. *The failure to identify circumstances under which a sentence of death is warranted.*

The discretion to decline to impose the death penalty in any capital case is absolute. For a death sentence cannot be pronounced unless the jury not only finds a "statutory" aggravating circumstance, but also "recommends the death sentence in its verdict." Ga. Code Ann. §26-3102 (1975 Supp.). Although one or more of the ten statutory aggravating circumstances may be present and acknowledged, the fact-finder, whether it be judge or jury, can still decline to impose the death penalty. Ga. Laws 1973, p. 162, No. 74. Section 27-2534.1(c) merely says that the death penalty shall *not* be imposed unless at least one of the statutory aggravating circumstances is present.[30] *Coley*

v. *State*, 231 Ga. 829, 204 S.E.2d 612, 620 (1974) (opinion of Mr. Justice Gunter, concurring and dissenting).

The statute does not specify or define "mitigating circumstances," and the sentencer is therefore free in any case to consider *anything* a mitigating factor which inspires mercy. There is obviously no case at all in which the sentencer might not conclude that some factual element was present which entitled the defendant to a milder sentence than death. But let us assume, implausibly, that some case could be found in which literally *nothing, no* circumstance of the crime or criminal, could be found to speak against extinction. The sentencer may nevertheless—notwithstanding that it finds an aggravating circumstance or circumstances and no mitigating circumstances—choose to spare this defendant's life.

Nowhere in the statute is there any "mandate [for] the [death] penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed)." *Furman* v. *Georgia, supra,* 408 U.S. at 311 (concurring opinion of Mr. Justice White). Instead the statute baldly "delegates to judges and juries the decision as to those cases, if any, in which the penalty will be utilized." *Ibid.*

House v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974), where a confused jury asked the court "what the difference is for life and death" (Transcript of Proceedings 621), and was recharged that "if you find that this aggravating circumstance existed . . . then you would be authorized to consider imposing a sentence of death . . ." (*id.* at 622-623). The jury then returned a verdict saying "We, the jury, fix the punishment of the defendant at death on counts one and two, *since* the offense of murder was outrageously or wantonly vile and horrible and that it involved torture to the victim and depravity of mind." (*id.* at 631, emphasis added).

c. *The indeterminateness of the aggravating circumstances.*

The particular "aggravating circumstances" specified in the statute are amorphous, intangible, elusive, and open to differing interpretations in like cases depending upon the subjective impressions or instincts of the sentencer. Concepts such as a "substantial history of serious assaultive criminal convictions," Ga. Code Ann. §27-2534.1(b)(1), the creation of a "great risk of death to more than one person," Ga. Code Ann. §27-2534.1(b)(3), and the use of a "weapon or device which would normally be hazardous to the lives of more than one person" Ga. Code Ann. §27-2534.1 (b)(3), are incapable of precise interpretation or application, and confer broad license upon particular judges and juries to define their content. As we have noted, reference to murders which are "outrageously or wantonly vile, horrible or inhuman in that [they] . . . involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(b)(7), provides no direction at all.

> "The best one can say is . . . the listed 'aggravating circumstances' are in part (and every part is vital, for only *one* need be 'found' to support a death sentence) exceedingly vague."

BLACK, *op. cit. supra* note 26, at 66.

Moreover, the statutory list of aggravating circumstances is not exclusive. At least one "statutory aggravating circumstance" is required to be found in order to support a death sentence, Ga. Code Ann. §26-3102; but after one such circumstance has been found, the jury's or the judge's ultimate life-or-death decision is to be made upon consideration not only of "any of the . . . statutory aggravating circum-

stances which may be supported by the evidence," but also of "any . . . aggravating circumstances otherwise authorized by law." Ga. Code Ann. §27-2534.1(b). There is, in short, no limit to what particular juries or judges may choose to treat as "aggravating." It is little wonder that the Georgia Supreme Court has characterized the capital sentencing decision as "the weighing of imponderables." *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365, 368 (1975).

d. *The scope of the pre-sentence hearing.*

There is also little limitation on the nature or the scope of judicial instruction, evidence, and argument that may be presented and considered at the pre-sentencing hearing. We have just seen that the trial judge "shall include" in his instructions "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b). The trial judge is also to give the jury such "statutory instructions" as he determines "to be warranted by the evidence." Ga. Code Ann. §27-2534.1(c). He

> "is thereby allowed, in these cases, to choose for consideration mitigating or aggravating circumstances *outside* those listed in the Act, and, where a jury hears the trial, to include in his instructions references to any such circumstances which *he* may *consider* to be supported or *warranted* by the evidence *and*, possibly, which he may *deem worthy* of consideration by the jury." [31]

[31] Comment, *Constitutional Law—Capital Punishment*—Furman v. Georgia *and Georgia's Statutory Response*, 24 MERCER L. REV. 891, 933 (1973) (original emphasis).

Evidence is nowise restricted:

> " 'The bifurcated trial was created to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. The statute is clear that the pre-sentence hearing is for additional evidence. . . .'
>
> "In *Williams* v. *State*, 226 Ga. 140(1) (173 S.E.2d 182) (1970, a case which was retried on the question of sentence only, it was held that a jury could consider the defendant's 'alibi' to mitigate his sentence. . . . The 1974 Act, supra, did not change the evidence which would be admissible at such hearing. . . .
>
> ". . . In *Dudley* v. *State*, 228 Ga. 551, 561 (186 S.E.2d 875) (1972), a majority of this court held that the issue to be decided at the pre-sentence hearing calls for different evidence from that on the trial which determines guilt or innocence. The *Dudley* decision held that evidence of general bad character could be admitted in those cases when the defendant had been notified prior to trial that such evidence would be presented."

Brown v. *State*, Ga. Sup. Ct. No. 30362, decided December 2, 1975, slip. op. at 5-6.

And argument is as unrestricted as evidence.[32] The general rule in Georgia is that "an attorney may make almost

[32] The only restriction is that the prosecutor may not seek to diffuse the responsibility of the jury by mentioning such matters as the possibility of appellate review in the case of a death sentence or of future parole board action in the case of a life sentence. *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779, 782-783 (1975) (dictum). Even with regard to this rule, considerable latitude is allowed. *Ibid.; Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975).

any form of argument he desires";[33] and there is no doubt that this rule applies in death-sentencing hearings.[34] In *Mason* v. *State,* Ga. Sup. Ct. No. 30338, decided January 7, 1976, slip op. at 7, the court held that it was permissible for the district attorney to argue that: "'we must keep our streets safe for society. This man has killed once before and if we let him live, he may get out on our streets and kill again. We must show to all people coming into this county that the citizens of this county will not put up with this kind of conduct." In *Chenault* v. *State,* 234 Ga. 216, 215 S.E.2d 223, 229 (1975), the district attorney was permitted to argue: "We can't have these reporters writing that a life sentence is all you get in this county." Obviously, these arguments have nothing to do with aggravating and mitigating circumstances in the particular case before the jury. They are simply calls to make an example of the defendant, and they point up—just as they exploit—the jury's unlimited discretionary power. The prosecutor in *Coker* v. *State,* 234 Ga. 555, 216 S.E.2d 782, 796 (1975), summed up aptly: "The State of Georgia and you as citizens have the right to put someone to death. That's what you've got to decide." But

[33] *Walker* v. *State,* 5 Ga. App. 606, 63 S.E. 142 (1908). *See, e.g., Ramsey* v. *State,* 232 Ga. 15, 205 S.E.2d 286 (1974) (prosecutor inveighed against a "rash" of crimes unattributed to the defendant); *Miller* v. *State,* 226 Ga. 730, 177 S.E.2d 253 (1970) (prosecutor called the defendant "a brute, beast, an animal, and a mad dog who did not deserve to live"); *Patterson* v. *State,* 124 Ga. 408, 52 S.E. 534 (1905) ("unless you have the manhood to write it in your verdict, you should be exiled from the good county of Heard").

[34] The statute under which pre-sentence proceedings are conducted in capital and noncapital cases does not prescribe differing rules for the two. Ga. Laws 1973, p. 162, No. 74. Nor did the latest version of the statute change the previous law regarding the scope of the matters that the jury might consider. See *Brown* v. *State,* Ga. Sup. Ct. No. 30362, decided December 2, 1975, slip op. at 5, quoted in text at page 37, *supra.*

> "[i]f the purpose of this Act is to strictly limit discretion in sentencing in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation . . . If the state desires to comport with [*Furman*] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to *specific, objective,* statutorily-prescribed guidelines, why, then, should the *hearing* of arguments and evidence in mitigation and aggravation remain unrestricted?"[35]

e. *Prosecutorial and judicial discretion to avert the death penalty at the stage of the pre-sentence hearing.*

In a subsequent section of this brief we shall discuss the broad discretion of the prosecutor to decline to press potentially capital charges through to capital convictions. See pages 54-58 *infra.* But even after a conviction of a "capital" charge, the prosecutor may, with the approval of the trial judge, forego a pre-sentence hearing and acquiesce in a sentence of less than death. *Jessen* v. *State,* 234 Ga. 791, 218 S.E.2d 52 (1975); *Gaines* v. *State,* 232 Ga. 727, 208 S.E.2d 798 (1974). The use of this procedure has not been limited to cases in which aggravating circumstances were obviously absent. In *Jones* v. *State,* 233 Ga. 662, 212 S.E.2d 832 (1975), for example, the prosecution elected not to seek the death penalty following the defendants' convictions of rape. These defendants had robbed their sixteen year-old victim, abducted her, and held her captive for a prolonged period, raping her repeatedly. *Compare Coker* v. *State,* 234 Ga. 555, 216 S.E.2d 782 (1975).

Similarly, a prosecutor has "discretion in deciding whether to ask the jury to impose the death penalty."

[35] Comment, *Constitutional Law—Capital Punishment*—Furman v. Georgia *and Georgia's Statutory Response,* 24 MERCER L. REV. 891, 932 (1973) (original emphasis).

Moore v. *State,* 233 Ga. 861, 213 S.E. 829, 834 (1975) (concurring opinion of Mr. Justice Hill). For example, in *Gaither* v. *State,* 234 Ga. 465, 216 S.E.2d 324 (1975), a robbery-murder case, *id.* at 325, the prosecutor told the jury:

> "we are not insisting on capital punishment. . . . I'm going to recommend—and I am doing this for more than one reason, because I think the defendants should have substantially the same sentence in this case. I'm going to recommend to you that you sentence Mr. Gaither to life imprisonment on the murder charge."

Gaither v. *State, supra* (Transcript of Proceedings 396). On the instruction of the court, the jury followed the prosecutor's recommendation. *Id.* at 400, 405.

3. Appellate Reconsideration of Death Sentences Merely Ratifies the Arbitrariness of the Georgia Capital Sentencing Process.

Although this Court, concurrently with ***Furman*** v. *Georgia,* and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[36] the Georgia Supreme Court relied upon provisions for similar appellate review in differentiating current Georgia capital punishment laws from those struck down in ***Furman***:

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

Coley v. *State,* 231 Ga. 829, 204 S.E.2d 612, 616 (1974).[37]

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[36] *See e.g. Alford* v. *Eyman,* 408 U.S. 939 (1972) (see *State* v. *Alford,* 98 Ariz. 124, 40 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717 (1956); *Hurst* v. *Illinois,* 408 U.S. 935 (1972) (see *People* v. *Hurst,* 42 Ill. 2d 217, 247 N.E. 2d 614 (1969)); *Alvarez* v. *Nebraska,* 408 U.S. 937 (1972) (see *State* v. *Alvarez,* 182 Neb. 358, 154 N.W. 2d 746, 748 (1967); Neb. Rev. Stat., §29-2308 (1943)); *Fesmire* v. *Oklahoma,* 408 U.S. 935 (1972) (see *Fesmire* v. *State,* 456 P.2d 573, 586-587 (Okla. Ct.Cr. App. 1969)); *Phelan* v. *Brierly,* 408 U.S. 939 (1972) (see *Commonwealth* v. *Phelan,* 427 Pa. 265, 234 A.2d 540 (1967); compare *Commonwealth* v. *Hough,* 358 Pa. 247, 56 A.2d 84, 85-86 (1948), with *Commonwealth* v. *Edwards,* 380 Pa. 52, 110 A.2d 216, 217 (1955)). The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances. *See e.g. State* v. *Maloney,* 105 Ariz. 348, 464 P.2d 793 (1970); *People* v. *Crews,* 42 Ill. 2d 60, 244 N.E. 2d 593 (1969); *State* v. *Hall,* 176 Neb. 295, 125 N.W. 2d 918 (1964); *Lewis* v. *State,* 451 P.2d 399 (Okla. Ct. Crim. App. 1969); *Commonwealth* v. *Green,* 396 Pa. 137, 151 A.2d 241 (1959).

[37] The 1973 statute was not as innovative as this passage makes it sound. The Georgia courts have always had and exercised the power to reverse capital convictions and death sentences in cases which are rendered in trials tainted with passion and prejudice. See e.g. *Collier* v. *State,* 115 Ga. 803, 42 S.E. 226 (1902); *Myers* v. *State,* 97 Ga. 76, 25 S.E. 252 (1895); *Woolfolk* v. *State,* 81 Ga. 558, 8 S.E. 724 (1889); cf. *Walker* v. *State,* 132 Ga. App. 476, 208 S.E. 2d 350 (1974); *Robinson* v. *State,* 6 Ga. App. 696, 65 S.E. 792 (1909). And while the court has in the past declined to review the justifiability of legally authorized death sentences (see, e.g. *Smithwick* v. *State,* 199 Ga. 292, 34 S.E. 2d 28 (1945)), there is some Georgia precedent for the proposition that a criminal penalty can be invalidated as excessive, although not violative of any statutory limit. *Brooks* v. *Sturdivant,* 177 Ga. 514, 170 S.E. 369 (1933).

These appellate safeguards, the court concluded, combined with the sentencing criteria of the statute (*but see* pages 30-39 *supra*) to "meet the U.S. Supreme Court's concern with arbitrariness." *Ibid.* Yet upon closer examination of the review provisions themselves and of experience under them, it is evident that they have done nothing to curb the arbitrariness and discrimination inevitable under a death sentencing procedure as strewn with opportunities for whimsy and vindictiveness as Georgia's.

a. *Review limited to death cases.*

The limited applicability of the appellate review provision severely restricts its capability to control arbitrariness at the trial level. The Georgia Supreme Court may be able to vacate death sentences which it finds "excessive", but it cannot review the decisions of prosecutors, trial judges and juries not to sentence potentially capital offenders to death in cases indistinguishable from others in which death sentences have been imposed and are upheld.[38] The process through which a "capriciously selected

[38] See, e.g., the cases listed in note 61, *infra*. The Georgia Supreme Court has acknowledged its limitations in this respect, but asserts that its function is only to insure that those death sentences that are imposed are not freakishly unusual.

> "As we view the court's duty in light of the *Furman* and *Jackson* cases and the statutory provisions designed by the Georgia legislature to meet the objections of those cases, this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed'."

Moore v. *State*, 233 Ga. 861, 213 S.E. 2d 829, 832 (1975).

random handful"[39] of defendants is chosen to be sent to their deaths obviously involves many decisions to avert the death penalty and only a few to impose it; and appellate review can only hope to affect the few.

> "No amount of appellate review can change the fact that the primary consideration of whether a man shall live or die still lies in the discretion of the jury, and that, while one jury might sentence a man to death, another might sentence the same man to life imprisonment, despite the presence of one or more of the aggravating circumstances. Thus, the fate of the defendant is dependent on the whim of his jury."[40]

b. *Review without principles of review.*

The standards for appellate review themselves inject a further element of capriciousness into sentencing under the 1973 legislation. The task of divining the motivations behind any given death sentence under an open-ended statute such as Georgia's seems well-nigh impossible. The breadth of the discretion given to sentencers by the law—to find or to ignore any of the vaguely-worded "aggravating circumstances" or the unenumerated and unfathomable "mitigating circumstances," and to refuse to sentence a defendant to death no matter what it finds—compound the inherent inability of an appellate court to detect the subtle but crucial atmospheric shadings of trials in which life is at stake, and make it altogether hopeless to suppose that the Georgia Supreme Court can discover the operation of "any . . . arbitrary factor" on sentencing determinations in any case. Ga. Code Ann. §27-2537(c)(1). Certainly the

[39] *Furman* v. *Georgia*, *supra*, 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[40] Brewster, *The Georgia Death Penalty State—Is It Constitutional, Even After Revision?*, 3 Ga. J. Corr. (No. 1) 14, 19 (1974).

determination whether a death sentence is "excessive . . . considering both the crime and the defendant," Ga. Code Ann. §27-2537(c)(3), constitutes a mere discretion to review discretion—little more than one additional opportunity to extend mercy to particular defendants who are thought deserving. Notably, but unsurprisingly, the Georgia Supreme Court has made no progress (indeed, it has made no effort) toward developing coherent or even articulate standards of appellate review. Instead it has, in most cases as in petitioner's (see note 42, *infra*), simply asserted that a particular death sentence did or did not pass muster under the statutory criteria, and then appended to its opinion the statutorily-required list of "similar" cases it considered in reaching its conclusion.[41] In no case has the court described the factual circumstances of cases cited in the statutorily-required list where (as is quite common) the appellate opinion does not disclose them; or explained why certain other cases were not considered; or undertaken to state how or why the facts of the case under review merited a harsher punishment than that imposed in other cases

[41] The significance of the cases cited in support of a particular decision to affirm a death sentence is often elusive. In petitioner's case for example, none of the cases listed provided any basis for the court's novel conclusion that the death penalty had been infrequently imposed for robbery. *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974). In *Moore* v. *State*, 233 Ga. 861, 213 S.E. 2d 829 (1975), the court cited 23 cases, all apparently involving felony murders, in support of its conclusion that the death sentence in the case at bar (also a felony-murder) "was not 'wantonly and freakishly imposed.'" *Id.* at 833. Of the 23, only 1 (petitioner Gregg's) was decided under the 1973 statute, and 8 were decided when Georgia had no death penalty (and thus involved mandatory life sentences). The remaining 14 cases were tried before *Furman*, 7 resulting in life sentences and 7 in death sentences with no appreciable basis for the different outcomes. This grab-bag of cases could obvious'y be cited to support *any* result in *any* case with equal propriety. The list shows nothing other than exactly what *Furman* recognized: that Georgia felony-murder sentencing is random at best.

where equally aggravated crimes had received non-death sentences.[42]

Only three times has the Georgia Supreme Court gone beyond a ritual recital of the applicable statutory "standards" in reviewing a death sentence,[43] and its statements in those three cases have been little more enlightening than its silence in others. In *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829 (1975), the court said it had determined from examining past cases that

[42] The usual litany is roughly that the court used in petitioner's case:

> "After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases which are hereto attached."

Gregg v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974). *See also*, e.g., *Mitchell* v. *State*, 234 Ga. 160, 214 S.E.2d 900, 902 (1975); *McCorquodale* v. *State*, 233 Ga. 369, 211 S.E.2d 577, 583 (1974); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810, 814 (1974); *Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668, 670 (1974), *Eberheart* v. *State*, 232 Ga. 247, 206 S.E. 2d 12, 18 (1974).

[43] In *Coley* v. *State*, *supra*, the one case in which the court vacated the death sentences of an appellant before it, two dissenting Justices found in similar past cases a pattern of maximum sentencing for rape defendants with prior convictions, which they argued dictated that Coley's death sentence should be affirmed. *Id.* at 618-619 (opinion of Mr. Justice Nichols). The majority undertook no such analysis, however, simply asserting that prior cases "indicate" that "similar factual situations and like aggravating circumstances" had resulted only in life sentences in the past, 204 S.E.2d at 617, a standard of review that one concurring Justice called "a nebulous measurement that I am unable to understand," *id.* at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

Whatever "standard" was developed in *Coley* was rendered even more "nebulous" by the Court's decision in *Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975). *Coker*, like *Coley*, involved a rape, robbery and abduction, little physical harm to the victim, and a defendant with a prior record. Yet Coker's death sentence was affirmed.

> "[n]otwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences . . . juries faced with similar factual situations have imposed death sentences. . . . Thus, the death sentence here was not 'wantonly and freakishly imposed.'"

Id., 213 S.E.2d at 833.[44] In both *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975), and *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975), the court observed that in cases "where witnesses to [other crimes] . . . were killed, or an attempt was made to kill such witnesses, the death penalty has been imposed," *Tamplin* v. *State, supra*, 218 S.E.2d at 784. The court cited 16 cases in its Appendix to *Tamplin*, all of which resulted in death sentences, and most of which did involve robbery or burglary-murders. It did not, however, cite any of the numerous similar murder cases which, both under pre-*Furman* law and under the 1973 Act, had resulted in life sentences instead.[45]

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[44] The court in *Moore* also suggested an additional reason for its decision by citing *Pass* v. *State*, 227 Ga. 730, 182 S.E.2d 779 (1971), a case in which "the murder took place in the victim's home, as occurred in the case under consideration" and the jury imposed a death sentence. *Moore* v. *State, supra*, 213 S.E.2d at 833. But the two cases seem hardly comparable. In *Pass* the defendant killed *two* victims, apparently defenseless, and later bragged about it, see *Pass* v. *State, supra*, 182 S.E.2d at 784; in *Moore* the defendant shot a burglary victim who was shooting at him, and later showed considerable remorse and pled guilty. *Moore* v. *State, supra*, 213 S.E.2d at 832.

[45] See, *e.g.*, *Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975); *Lerch* v. *State*, 234 Ga. 857, 218 S.E.2d 571 (1975); *Jackson* v. *State*, 234 Ga. 549, 216 S.E.2d 834 (1975); *Leach* v. *State*, 234 Ga. 467, 216 S.E.2d 326 (1975); *Hill* v. *State*, 232 Ga. 800, 209 S.E.2d 153 (1974); *Dutton* v. *State*, 228 Ga. 850, 188 S.E.2d 794 (1972); *Stevens* v. *State*, 228 Ga. 621, 187 S.E.2d 281 (1972); *Atkins* v. *State*, 228 Ga. 578, 187 S.E.2d 132 (1972); *Morris* v. *State*, 228 Ga. 39, 184 S.E.2d 82 (1971).

In both *Tamplin* and *Jarrell* the court recited that an additional factor involved in its decision was that "[t]he cold-blooded and callous nature" of the crime had been "condemned by death in other cases," *Jarrell* v. *State, supra*, 216 S.E.2d at 270; *Tamplin* v. *State, supra*, 218 S.E.2d at 784—a judgment highly subjective at best, and which also did little to distinguish these cases from others in which no death penalty had been imposed. See, *e.g.*, *Stapleton* v. *State*, —— Ga. ——, 220 S.E.2d 269 (1975); *Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975); *Barker* v. *State*, 233 Ga. 781, 213 S.E.2d 624 (1975).

[46] In *Ross* v. *State*, 233 Ga. 356, 211 S.E.2d 361 (1974), the court noted that nothing prevented it from "examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense" in the course of its "independent review." *Id.* at 359. But it did not explain how it proposed to become informed about such cases; and in *Moore* v. *State, supra*, where the appellant attempted to call to the court's attention two unappealed cases allegedly similar to his, the court said that these cases "cannot be considered by this Court. . . ." *Id.* at 832.

[47] See Brewster, *The Georgia Death Penalty Statute—Is It Constitutional, Even After Revision?*, 3 Ga. J. Corr. (No. 1) 14, 19 (1974), for inequities produced by this form of appellate review.

c. *Measurement with an arbitrary yardstick.*

The Georgia Supreme Court's exclusive reliance on cases that are appealed[46] as the standard by which to determine whether a "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Ga. Code Ann. §27-2537 (c)(3), manifestly provides no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is woefully distorted in two ways. First, cases are ignored which involve similar factual circumstances but were disposed of by the various pre-conviction selective mechanisms described at pages 53-65 *infra*. Second, no account is taken of capital convictions for which a life sentence is imposed and which are not appealed. Both excluded groups of cases, of course, represent by definition prosecutions where death sentences were *not* imposed; so death-sentenced appellants before the Georgia Supreme Court must necessarily play the deadly game against a stacked deck.[47] The court altogether lacks the capacity to determine, from a skewed and meager sample of this sort, what penalties are reg-

ularly and normally imposed in "similar cases," Ga. Code Ann. §27-2537(c)(3).

But this is not the whole problem. For the Georgia Supreme Court, as explicitly authorized by statute,[48] has persisted in comparing the death sentences before it with death sentences meted out under Georgia's pre-*Furman* procedures[49]—that is, death sentences which were "wantonly and . . . freakishly imposed," *Furman* v. *Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which [the death penalty was] . . . imposed from the many cases in which it [was] . . . not," *id.* at 313 (concurring opinion of Mr. Justice White), and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [was] . . . poor and despised, lacking political clout, or if he [was] . . . a member of a suspect or unpopular minority," *id.* at 255 (concurring opinion of Mr. Justice Douglas). A clearer case of an appeal from Paul Drunk to Paul Sober can hardly be imagined.[50] And of course, the system is self-perpetuating: as time passes, each new death sentence is approved by comparison with previous ones which were in turn approved as comparable to others *Furman* held cruel and unusual.[51]

[48] *See* Ga. Code Ann. §27-2537(f).

[49] This is true even in the court's most recent decisions. *See*, e.g., *Mason* v. *State*, Ga. Sup. Ct. No. 30338, decided January 7, 1976, in which 12 of the 16 cases considered were pre-*Furman*, some of them (e.g. *Henderson* v. *State*, 227 Ga. 68, 179 S.E.2d 76 (1970), *vacated* 408 U.S. 938 (1972)) explicitly held unconstitutional by this Court.

[50] *Cf. Lane* v. *Wilson*, 307 U.S. 268 (1938).

[51] For example, in petitioner Gregg's case, all but one of the death-sentence cases cited by the Georgia Supreme Court were pre-*Furman* cases. *See Gregg* v. *State*, *supra*, 210 S.E.2d at 667. The exception is *House* v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974), which in turn was affirmed with exclusive reference to pre-*Furman* cases. See *House* v. *State*, *supra*, 205 S.E.2d at 222.

These appellate review procedures have thus far resulted in the removal, "pursuant to a nebulous measurement," [52] of one inmate from the Georgia death row population.[53] In every other instance of sentencing review, the Georgia Supreme Court has affirmed the sentencer's decision to condemn the defendant.[54] Its role in the capital sentencing process clearly has not regularized and clearly cannot regularize the infliction of the punishment of death in Georgia.

4. The Results of the Georgia Sentencing Process: Caprice and Arbitrariness.

In sum,

> "[W]hat Georgia has done is to lay down a smoke-screen of plenteous words, which, on hasty reading,

[52] *Coley* v. *State*, 231 Ga. 829, 204 S.E.2d 612, 620 (1974) (opinion of Mr. Justice Gunter, concurring in part and dissenting in part). But see note 43, *supra*.

[53] *Coley* v. *State*, *supra* note.

[54] *Eberheart* v. *State*, 232 Ga. 247, 206 S.E.2d 12 (1974); *House* v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668 (1974); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Ross* v. *State*, 233 Ga. 361, 211 S.E.2d 356 (1974); *McCorquodale* v. *State*, 233 Ga. 369, 211 S.E.2d 577 (1974); *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Mitchell* v. *State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Chenault* v. *State*, 234 Ga. 210, 215 S.E.2d 223 (1975); *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975); *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975); *Mason* v. *State*, Ga. Sup. Ct. (No. 30338, decided December 2, 1975). The court *has* continued, in the wake of petitioner Gregg's case, to reverse death sentences for robbery on the ground that they are infrequently imposed; but in no case has it done so where the death sentence was the only one pronounced on a particular defendant. *See Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810 (1974). The court has also reversed three death sentences for *procedural* error in the penalty phase. *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Jordan* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Brown* v. *State*, —— Ga. ——, 220 S.E.2d 922 (1975).

> mask the fact that exactly the same old unbridled jury discretion is there, if only the jury, guided by court and prosecutor, can grope its way through the verbal haze." [55]

For

> "the primary consideration of whether a man shall live or die is still left to the bald discretion of the jury. It is only after the decision that the verdict shall be death has been made, that the jury goes about the process of rationalizing away the caprice or arbitrariness of their actions." [56]

And "[n]o amount of appellate review" will serve, after the fact, to regularize the process.[57]

The inevitable result is that sentencing in Georgia remains now, as it was at the time of *Furman*, irrational and arbitrary in the extreme. That it could be little else is evident, for history in this country has now shown that where a statutory system permits the death penalty to be "wantonly and . . . freakishly imposed" [58] it will be.[59] We have previously noted some of the reasons why appellate reports cannot tell the full story—or any appreciable part of the story—of this lottery of life and death.[60] But enough of the story appears in the Georgia appellate reports to establish the fact of capriciousness, if not its dimensions. The capital sentencing pattern that emerges is no pattern at all, the same kind of crazy-quilt of arbitrary and in-

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[55] BLACK, *op. cit. supra* note 26, at 65.

[56] Brewster, *The Georgia Death Penalty Statute—Is It Constitutional, Even After Revision?*, 3 GA. J. CORR. (No. 1) 14, 18 (1974).

[57] *Id.* at 19.

[58] *Furman* v. *Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[59] *See* Part III of the Brief for Petitioner, *Jurek* v. *Texas*, No. 75-5394.

[60] See pages 42-43, *supra*.

consistent decision-making[61] that was present at the time of *Furman*.[62]

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[61] *Compare, e.g., Barrow* v. *State*, Ga. Sup. Ct. No. 30322, decided December 2, 1975 (defendant coldly shot victim to death in course of a grocery store robbery—death sentence), and *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975) (defendant shot victim to death in course of grocery store robbery—death sentence), *with Thomas* v. *State*, 233 Ga. 237, 210 S.E.2d 675 (1974) (defendant stabbed victim [16 times] to death in course of grocery store robbery—life sentence), *and Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975) (defendant coldly shot victim to death in gas station robbery—life sentence). *Compare Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975) (street robbery in which two defendants shot and killed victim—death sentences), *with Gaither* v. *State*, 234 Ga. 465, 216 S.E.2d 324 (1975) (street robbery in which one of two defendants shot and killed victim—life sentences), *and Sims* v. *State*, 234 Ga. 177, 214 S.E.2d 902 (1975) (street robbery in which defendant shot and killed witness while fleeing—life sentence), *and Leach* v. *State*, 234 Ga. 467, 216 S.E.2d 326 (1975) (robbery of taxi driver in which defendant shot and killed victim in order to prevent victim from fleeing—life sentence [see Transcript of Record 709-712]). *Compare Chenault* v. *State*, 234 Ga. 216, 215 S.E.2d 223 (1975) (defendant shot three victims without provocation, two died—death sentence) *with Stapleton* v. *State*, —— Ga. ——, 220 S.E.2d 269 (1975) (defendant shot three victims without provocation, two died—life sentence). *Compare Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659 (1974) (defendant murdered two victims and stole their car —death sentence), *with Brannen* v. *State*, —— Ga. ——, 220 S.E.2d 264 (1975) (defendant murdered two victims and stole their car —life sentence), and *Lerch* v. *State*, 234 Ga. 857, 218 S.E.2d 571 (1975) (defendant and another brutally murdered victim of secluded robbery—life sentence [see Transcript of Record 10-30]). *Compare Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668 (1974) *and Eberheart* v. *State*, 232 Ga. 247, 206 S.E.2d 12 (1974) (co-perpetrators of kidnap-rape in which victim was badly beaten—death sentences), *with Wood* v. *State*, 234 Ga. 758, 218 S.E.2d 47 (1975) (rape in which victim was badly beaten—life sentence). *Compare Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975) (rape/robbery/kidnapping, victim not beaten—death sentence), *and Coley* v. *State*, 231 Ga. 829, 204 S.E.2d 612 (1974) (rape/robbery/kidnapping, victim beaten but not seriously—death sentence), *with Jones* v. *State*, 233 Ga. 662, 212 S.E.2d 832 (1975) (rape involving robbery and abduction, victim not beaten—life sentence), and *Allen* v. *State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (rape/kidnapping, victim not beaten—life sentence).

[62] At the time of *Furman* v. *Georgia*, several states had limitations on the jury's discretion to make the life-death choice and

Thus, despite the mandate of *Furman* v. *Georgia,* petitioner remains simply one of "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," [63] with "no meaningful basis for distinguishing" the spared from the condemned.[64] This case does not therefore necessitate resolution of the question whether, in the words of Chief Justice Burger's *Furman* dissent, "[t]here is [any] . . . reason to believe that sentencing standards in any form will substantially alter the discretionary character of the [pre-*Furman*] . . . system of sentencing in capital cases.[65] *See also McGautha* v. *California,* 402 U.S. 183, 208 (1971); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 174 (H.M.S.O. 1953) [Cmd. 8932]. For it is clear that

> "... the Georgia statutes involved in this case authorize nothing more and nothing less than the discretionary imposition of the death penalty by the fact-finder."

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standards for the appropriate exercise of that discretion which were little, if any, less clear and confining than those in the present Georgia statutes. Death sentences from these states were nevertheless uniformly held unconstitutional. *Davis* v. *Connecticut,* 408 U.S. 935 (1972) (see Conn. Gen. Stat. Ann., §53-10 (1967)); *Moore* v. *Illinois,* 408 U.S. 786 (1972) (see *People* v. *Black,* 367 Ill. 209, 10 N.E.2d 801, 804 (1937); *People* v. *Sullivan,* 245 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c) (1)); *Alvarez* v. *Nebraska,* 408 U.S. 937 (1972) (see *Sundahl* v. *State,* 154 Neb. 550, 48 N.W.2d 689, 704 (1951)); *Billingsley* v. *New Jersey,* 408 U.S. 934 (1972) (See N.J. Stat. Ann., §2A:113-4 (1969); *State* v. *Reynolds,* 41 N.J. 163, 195 A.2d 449 (1963)); *Duling* v. *Ohio,* 408 U.S. 936 (1972) (See *State* v. *Tudor,* 154 Ohio St. 249, 95 N.E.2d 285, 390 (1950); *State* v. *Eaton,* 19 Ohio St. 145, 249 N.E.2d 897 (1969)); *Herron* v. *Tennessee,* 408 U.S. 937 (1972) (see Tenn. Code Ann., §39-2406 (1955); *Woodruff* v. *State,* 164 Tenn. 530, 51 S.W.2d 843, 847 (1932)).

[63] *Furman* v. *Georgia, supra,* 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[64] *Id.* at 313 (concurring opinion of Mr. Justice White).

[65] *Id.* at 401.

Coley v. *State, supra,* 204 S.E.2d at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

B. *Before and After the Pre-Sentence Hearing*

The 1973 Georgia capital punishment statute was set atop a system already riddled with opportunities for arbitrariness in the selection of those who are to live and those who are to die for "capital" crime in Georgia. Both William Henry Furman and petitioner Troy Leon Gregg were "capriciously selected" [66] to die not only by their respective sentencing juries, but by a process which, from start to deadly finish, is "pervaded by discretion." [67] The "large number of actors" [68] who decide whether or not a given defendant is "fit to live" [69] play their parts in Georgia, as elsewhere,[70] from the inception of a "capital" prosecution to the eve of execution.

Both discretion and arbitrariness are inherent in unregulated prosecutorial charging and plea bargaining authority—in raw exercises of sentencing choice under guise of degree-of-guilt determinations made by trial juries applying opaque and amorphous grading schemes to the gradeless question of life or death—and in the executive's "prerogative of mercy" that kills where it does *not* alight. All of these have been discussed at length in the Brief for

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[66] *Furman* v. *Georgia, supra,* 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[67] *Coley* v. *State, supra,* 204 S.E.2d at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

[68] Brief for the United States as *Amicus Curiae* in *Fowler* v. *North Carolina,* No. 73-7031, at 76.

[69] *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n.20 (1968).

[70] *See* Parts III, respectively, of the Briefs for Petitioners in *Roberts* v. *Louisiana,* No. 75-5844, and *Jurek* v. *Texas,* No. 75-5394, and of the Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* in *Proffitt* v. *Florida,* No. 75-5706.

Petitioner, *Fowler* v. *North Carolina*, at pp. 41-101 [hereafter cited as Petitioner's *Fowler* Brief]. We will not burden the Court here with a repetition of that discussion, but will only outline the particular features of Georgia criminal law and procedure that implement the process of capricious selectivity which is described in its more general features in the *Fowler* brief.

1. Prosecutorial Charging Discretion.

The role of a Georgia district attorney is broadly discretionary.

> "The whole proceeding, from the time the case is laid down before him, where an indictment is demanded, until the rendition of the verdict, is under his direction, supervision and control . . ."

Hicks v. *Brantley*, 102 Ga. 264, 29 S.E. 459, 462 (1897).

The district attorney's discretionary authority begins with the decision whether to prosecute and what charges to bring. Although the Georgia common-law tradition requires indictment by a grand jury in capital cases,[71] the district attorney's duty to "attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them," Ga. Code Ann. §24-2908(2) (1971), places the charging decision effectively in his hands.

> "The [district attorney] . . . is the official counselor of the grand jury. They look to him for advice and counsel in finding true bills, and their actions thereon are nearly always guided by him."

Nichols v. *State*, 17 Ga. App. 593, 87 S.E. 817, 822 (1916). It is the prosecutor who "determine[s] whether or not to

[71] *Smith* v. *Strozier*, 226 Ga. 283, 174 S.E.2d 417 (1970) (dictum); *Webb* v. *Henlery*, 209 Ga. 447, 74 S.E.2d 7 (1953).

commence a particular prosecution," *Hicks* v. *Brantley*, *supra*, 29 S.E. at 462, and who "draws the bill of indictment"—and thus determines what charges it will contain—if one is commenced. *Ibid.*; *Scott* v. *State*, 53 Ga. App. 61, 185 S.E. 131, 135 (1936).

The district attorney has the discretion not only to initiate a prosecution, but also "to discontinue one already begun." *Hicks* v. *Brantley*, *supra*, 29 S.E. at 462. He must obtain the consent of the court to enter a formal *nolle prosequi*[72] (though standards governing that consent are nowhere specified)[73]—but a prosecution apparently may be informally abandoned "even without the concurrence of a judicial office." *Smith* v. *Embry*, 103 Ga. App. 375, 119 S.E.2d 45, 49 (1961) (dictum); *cf. Waters* v. *Walkover Shoe Shop*, 142 Ga. 137, 82 S.E. 537 (1914).

2. Plea Bargaining.

Most importantly, perhaps, a district attorney has "discretion in bargaining for a plea of guilty in exchange for a non-death sentence." *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829, 834 (1975) (concurring opinion of Mr. Justice Hill).[74] Though Georgia trial courts have power—itself

[72] Ga. Code Ann. §27-1801 (1973); *Edwards* v. *State*, 121 Ga. 590, 49 S.E. 674 (1905). A *nolle prosequi* is not a bar to further prosecution unless it is entered after the case has been submitted to the jury. *McGahee* v. *State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975). A prosecutor may achieve the same result as a *nolle prosequi* by moving the court to place a case on the "dead docket." *See Underhill* v. *State*, 129 Ga. App. 65, 198 S.E.2d 703 (1973).

[73] It seems unlikely that in most cases the consent of the court is anything more than a formality. "Ordinarily a motion to nolle pros. made by [a district attorney] is granted . . . ." *Griffin* v. *State*, 12 Ga. App. 615, 77 S.E. 1080, 1085 (1913).

[74] Ga. Code Ann. §27-2528 (1975 Supp.) provides:

> "[a]ny person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having juris-

discretionary—to reject guilty pleas[75] and are not bound by prosecutorial stipulations as to sentence,[76] a district attorney's "advice [is] generally accepted that a plea of guilty be received with a recommendation for [lesser] punishment." *Griffin* v. *State, supra,* at 1085.

> "Well-nigh any attorney representing one accused of crime would unhesitatingly accept an assurance from the [district attorney] . . . that if a plea of guilty with a recommendation would be entered the recommendation would be respected by the court."

Ibid. Further, if a prosecutor's recommendation of punishment is *not* accepted by the court, a guilty plea made in reliance on a representation that the court would take it may be withdrawn. *Ballard* v. *State,* 131 Ga. App. 847, 207 S.E.2d 246 (1974); *Holston* v. *State,* 103 Ga. App. 373,

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diction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment."

No pre-sentence hearing before a jury is required in guilty plea cases. *Ballard* v. *State,* 131 Ga. App. 847, 207 S.E.2d 246 (1974). Instead, the presiding judge fixes the sentence, and may impose the death penalty or any other authorized penalty "in the exercise of his discretion." *Massey* v. *State,* 220 Ga. 883, 142 S.E.2d 832, 837 (1965); *Moore* v. *State,* 233 Ga. 861, 213 S.E.2d 829, 834 (1975) (concurring opinion of Mr. Justice Hill). Before pronouncing sentence the judge may hold a hearing, *Hooks* v. *State,* 233 Ga. 149, 210 S.E.2d 668 (1974); and before pronouncing a death sentence he "must find one of the statutory aggravating circumstances provided in section 27-2534.1 . . . except in cases of treason or aircraft hijacking." Ga. Code Ann. §27-2528 (1975 Supp.) But the court need not impose, or even consider, a death penalty in any case.

[75] A guilty plea may or may not be accepted by the judge, "in his discretion." *McCorquodale* v. *State,* 233 Ga. 369, 211 S.E.2d 577, 582 (1974); *Pass* v. *State,* 227 Ga. 730, 182 S.E.2d 779 (1971).

[76] *Shearer* v. *State,* 128 Ga. App. 809, 198 S.E.2d 369, 370 (1973); *Griffin* v. *State, supra,* 77 S.E. at 1085.

119 S.E.2d 302, 304 (1961) (dictum); *Rowland* v. *State,* 72 Ga. App. 793, 35 S.E.2d 372 (1945); *Griffin* v. *State, supra.*

Thus in fact, if not technically in law, Georgia prosecutors have the power to assure that the court will impose a non-death sentence on a guilty plea, and they have a discretion to give or to withhold that assurance which is totally unfettered by the 1973 capital punishment statute or by any other significant restriction.[77] It is the plea bargaining process that accounts for an estimated ninety percent of all criminal dispositions,[78] and the prosecutor's decision to engage in it is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[79] Yet Georgia law and practice leave that decision to individual district attorneys, and provide no oversight, guidance, or control to insure against inconsistency and arbitrariness in the plea bargaining policies of district attorneys generally or of any particular district attorney.

Further, as we have noted at pages 42-43 *supra,* Georgia's appellate-review procedures create a multiplier effect through which plea bargaining enhances the capriciousness of the overall system in a compound fashion. Since life sentences received pursuant to plea bargains will seldom be appealed, this large group of capital-case dispositions forms no part of the universe considered by the Georgia

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[77] See *Thomason* v. *Caldwell,* 229 Ga. 637, 194 S.E.2d 112 (1972). The "consent verdict" procedure sometimes used in Georgia—whereby the defense and prosecution stipulate to a jury, waive all argument and evidentiary presentation, and ask a juror to sign, as foreman, a prepared verdict finding the defendant guilty but recommending mercy—provides an alternative to a guilty plea that may be even freer from judicial supervision and control. See *Caldwell* v. *Paige,* 230 Ga. 456, 197 S.E.2d 692 (1973).

[78] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 9 (G.P.O. 1967).

[79] Black, *op. cit. supra* note 26 at 43. See also Petitioner's *Fowler* Brief, at 53-61.

Supreme Court in its statutory sentence review. The invisibility of prosecutorial exercises of mercy thereby prevents meaningful patterns of capital sentencing from being formed or enforced at any level of the process.

3. Jury Discretion.

The sentencing discretion expressly conferred upon trial juries by the 1973 Georgia capital punishment statutes, see pages 31-34 *supra,* is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might consign him to die. At the first stage of Georgia's bifurcated trial, the jury may also avert any possibility of a death sentence by convicting the defendant of a lesser offense[80] or by finding his conduct nonculpable, through the application of legal doctrines that supply an indeterminate "dispensing power [couched] . . . in a mystifying cloud of words." [81]

A Georgia trial judge must charge lesser included offenses when they are established under "any view" of the evidence, *Sims* v. *State,* 203 Ga. 668, 47 S.E.2d 862 (1948), that is, "where, from the evidence or from the defendant's statement at the trial, there is *anything deducible* which would *tend* to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a *doubt* as to which

[80] Ga. Code Ann. §26-505 (1972) provides:

"An accused may be convicted of a crime included in a crime charged in the indictment, information, or accusation. A crime is so included when:

"(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged, or

"(b) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

[81] Cardozo, Law and Literature 101 (1931).

of these grades [of the offense] . . . was committed." *Echols* v. *State,* 46 Ga. 668, 168 S.E. 790, (1933) (emphasis in original), citing *Reeves* v. *State,* 22 Ga. App. 628, 97 S.E. 115 (1918). So, "[i]f there be any evidence, however slight, as to whether the offense is murder or manslaughter, instructions as to both should be given to the jury." *Linder* v. *State,* 132 Ga. App. 624, 208 S.E.2d 630, 631 (1974).[82] Trial judges are admonished to submit lessers, whether or not the defendant requests their submission, *Banks* v. *State,* 227 Ga. 578, 182 S.E.2d 106 (1971), or even objects to it, *Hobbs* v. *State,* 134 Ga. App. 850, 216 S.E.2d 674 (1975); and even where the lessers are inconsistent with the defendant's version of the facts, *Henderson* v. *State,* 234 Ga. 827, 218 S.E.2d 612 (1975). Lessers need not be submitted if there is no evidence to support them, *Henderson* v. *State,* 227 Ga. 68, 179 S.E.2d 76 (1970): it was upon this theory that the Georgia Supreme Court sustained the trial judge's refusal to submit manslaughter instructions to the jury at petitioner Gregg's trial, *Gregg* v. *State,* 233 Ga. 117, 210 S.E.2d 659, 663 (1974).

These rules operate in the context of a body of substantive law that makes their general application highly speculative. Georgia does not recognize degrees of murder, but defines this potentially capital crime in terms of striking breadth and imprecision:

> "(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate itention unlawfully to

[82] Both voluntary and involuntary manslaughter are lesser included offenses of the crime of murder. *Waller* v. *State,* 107 Ga. App. 609, 131 S.E.2d 111 (1963); *Perry* v. *State,* 78 Ga. App. 273, 50 S.E.2d 709, 714 (1948); *Lee* v. *State,* 74 Ga. App. 212, 39 S.E.2d 426 (1946).

take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

Ga. Code Ann. §26-1101 (1972). Notwithstanding the manifest inscrutability of the "malice" concept, see *Leonard* v. *State*, 113 Ga. 435, 60 S.E. 251 (1900), the practice of defining it to the jury merely by reading its statutory definition has been approved. *Bowen* v. *State*, 225 Ga. 422, 169 S.E.2d 322 (1969).

In many cases, the line between murder and manslaughter depends upon the presence or absence of "a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person"; but a provoked killing is nonetheless murder if the jury finds there was "an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard."[83] The administration of these opaque elements lies, in the first instance, with the trial judge who

[83] Ga. Code Ann. §26-1102 (1972) provides:

"A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder. A person convicted of voluntary manslaughter shall be punished by imprisonment for not less than one nor more than 20 years.

must decide whether the facts of the case present them; but if there is any evidence to support a provocation-and-passion charge, the ultimate determination is within the exclusive province of the jury. *Linder* v. *State*, 132 Ga. App. 624, 208 S.E.2d 630 (1974).[84]

Moreover, the 1968 Georgia Criminal Code altered the prior Georgia law relating to attempts and assaults,[85] so that "[a] person may be convicted of criminal attempt if the crime attempted was actually committed in pursuance of the attempt," Ga. Code Ann. §26-1004 (1972), and "[a] person may be convicted on [sic] an assault with intent to commit a crime if the crime intended was actually committed as a result of the assault," Ga. Code Ann. §26-1303 (1972).[85] Under the new provisions, apparently trial judges

[84] *Linder* illustrates the extent of the jury's discretion to find provocation wherever it wishes. There "the amount of provocation . . . was not shown, nor the length of cooling time between then and the time of the killing." 208 S.E.2d at 631. Nonetheless, the Court of Appeals held that "these were all for the jury's determination, and the jury's province was to decide as to whether the offense be murder or manslaughter." *Ibid.* *See also, e.g., Robinson* v. *State*, 109 Ga. 506, 34 S.E. 1017 (1900), where, though the Supreme Court believed "the truth of the case" was of "a cold-blooded and wanton murder" of a Black man by a White, *id.* at 1018,

"[t]here was some little evidence, and a portion of the statement, sufficiently bringing into the case the theory of mutual combat to authorize a charge on voluntary manslaughter, and a conviction of this offense at the hands of a jury who wished to lean strongly to the side of mercy. We therefore approve the charge on voluntary manslaughter, and, on the merits of the case, decline to disturb the jury's finding. There was too much of righteousness in it for us to set it at naught."

Ibid.

[85] Ga. Code Ann. §27-2508, which was apparently not repealed by the 1968 Criminal Code, prohibits exactly what §§ 26-1004 and 26-1303 allow, but the Georgia Supreme Court has noted that the new statutes changed the old rule. *Ward* v. *State*, 231 Ga. 484, 202 S.E.2d 421 (1973); *Jones* v. *Smith*, 228 Ga. 648, 187 S.E.2d 298 (1972).

are not required to charge on attempt and assault where a greater offense was consummated,[86] but are permitted to do so.[87]

Doctrines of justification submitted for the jury's consideration in Georgia murder cases also leave ample room for "response to sentiment under the guise of resolving issues of evidential doubt." [88] Some such justifications are defined in impressionistic and moralistic terms by statute—like the justification of self-defense that was submitted to the jury at petitioner Gregg's trial[89]—but Ga. Code Ann.

[86] *Payne* v. *State*, 231 Ga. 755, 204 S.E.2d 128 (1974); *Ward* v. *State*, 231 Ga. 484, 202 S.E.2d 421 (1973).

[87] *Cf. Holcomb* v. *State*, 230 Ga. 525, 198 S.E.2d 179 (1973). *Holcomb* held squarely that instructions on robbery by intimidation were permitted but not required where all the evidence showed robbery by armed force, in view of Ga. Code Ann. §26-1902 (1972), which authorized conviction of that lesser offense. *Holcomb* was cited as primary authority in both *Payne* and *Ward*, note 86 *supra*. Consistently with *Holcomb*, the trial court in petitioner Gregg's case instructed on robbery by intimidation (T. 432) even though the only evidence of robbery showed that it was committed by shooting Mr. Moore and Mr. Simmons to death.

[88] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

[89] T. 430-421. Ga. Code Ann. §26-901(a) (1972) makes homicide justifiable when the person committing it is justified in his use of force. Ga. Code Ann. §26-902 provides:

> "(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony.
>
> "(b) A person is not justified in using force under the circumstances specified in paragraph (a) of this section if he: (1) initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or (2) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or (3) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force."

§26-901(f) (1972) also provides that homicide may be held justified "[i]n all instances which stand upon the same

Thus, a jury evaluating a self-defense claim must first decide whether the defendant reasonably believed that he was in danger of death or great bodily injury (that is, "serious personal injury," *Williams* v. *State*, 126 Ga. 454, 191 S.E.2d 100, 102 (1972)). The Georgia Supreme Court has held that "the reasonable fears of the defendant" are not equivalent to "the fears of a reasonable man," and that it is the latter which establish the standard of conduct for justifiable homicide, *Moore* v. *State*, 228 Ga. 662, 187 S.E.2d 277, 279 (1972); but the court has not explained the distinction between the erroneous and correct standards. In any event, "'[i]n all . . . cases the motive with which the slayer acted is for determination by the jury; and if it be claimed that the homicide was committed, not in a spirit of revenge, but under the fears of a reasonable man, it is for the jury to decide whether or not the circumstances were sufficient to justify the existence of such fear.'" *York* v. *State*, 226 Ga. 281, 174 S.E.2d 418, 419 (1970), *quoting Jarrard* v. *State*, 206 Ga. 112, 55 S.E.2d 706, 709-710 (1949). "The standard of a reasonable man, by which the conduct of a particular person under given circumstances is to be judged, is one which the jury must determine from their own observation and their common knowledge and experience." *Fudge* v. *State*, 190 Ga. 340, 9 S.E.2d 259, 262 (1940).

Further subtle distinctions abound. The jury must, for example, distinguish between "provocation by threats," which will neither justify nor reduce murder, and "threats accompanied by menaces," which may justify it altogether. *York* v. *State*, *supra*, 174 S.E.2d at 419, *Jarrard* v. *State*, *supra*, 55 S.E.2d at 709. It must determine whether the defendant provoked an incident with "the intent to use [the other's response] . . . as an excuse to inflict bodily injury" on him or merely "creates a necessity for the deceased to defend himself," *Lundy* v. *State*, 119 Ga. App. 585, 168 S.E.2d 199, 201 (1969). In the latter case, the defendant's use of force is justified if, but only if, he "withdraws . . . and effectively communicates" his intent to do so. Ga. Code Ann. §26-902(b) (1972); *see Lundy* v. *State*, *supra*. The jury must also determine whether the two parties engaged in battle with a "willingness, a readiness and an intention" to fight, *Williams* v. *State*, 232 Ga. 203, 206 S.E.2d 37, 38 (1974), in which case the killing may not

footing of reason and justice as those enumerated in this Chapter." [90] And Georgia law relating to insanity as a criminal defense exhibits characteristic murkiness.[91]

Palpably, these various doctrines—theoretically requiring factual determinations but realistically making those determinations both mysterious and "demeaningly trivial compared to the stakes" [92]—invest trial juries with a broad range of optional outlets through which particular capital offenders may be permitted to escape even the risk of a death sentence if, in the jurors' eyes, they do not *deserve* to die. In some but not all cases, the scope of the jury's discretion in this regard depends upon an antecedent exercise of the trial court's authority to submit or to withhold the submission of lesser offenses or defenses. But it blinks reality to suppose that trial judges, any more than appellate judges, can regularly and uniformly avoid the temptation described by Mr. Justice Jackson: "to strain the

be justified but may be reduced to voluntary manslaughter under the doctrine of "mutual combat," *see Williams* v. *State, supra,* 206 S.E.2d at 38, *Grant* v. *State,* 120 Ga. App. 244, 170 S.E.2d 55, 56 (1969).

[90] *See, e.g., Ross* v. *State,* 135 Ga. App. 169, 217 S.E.2d 170 (1975); *Brown* v. *State,* 228 Ga. 215, 184 S.E.2d 655 (1971).

[91] See BLACK, *op. cit. supra* note 26, at 50-55; GOLDSTEIN, THE INSANITY DEFENSE 44-46 (1967). In Georgia, insanity is not isolated as an issue for separate jury determination, but in reaching its general verdict the jury must find beyond a reasonable doubt that the defendant knew right from wrong. *Revill* v. *State,* 235 Ga. 71, 218 S.E.2d 816 (1975). The defendant is only required to show to "the reasonable satisfaction of the jury," *id.* at 818, that he lacked the requisite mental capacity. But what may "satisfy" the jury or the law can vary widely: uncontradicted psychiatric testimony of medical psychosis will not necessarily suffice, *see Chenault* v. *State,* 234 Ga. 216, 215 S.E.2d 223 (1975), whereas "the [criminal] act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind," *Brown* v. *State,* 228 Ga. 215, 184 S.E.2d 655, 658 (1971).

[92] KALVEN & ZEISEL, *op. cit. supra* note 88, at 448-449.

evidence and even, in close cases, the law" in order to give a man with his life at stake in a doubtful case "another chance." *Stein* v. *New York,* 346 U.S. 156, 196 (1953). How great the strain will be depends, of course, upon the particular judge, the particular case, and why it is deemed doubtful. Here, once again, any hope of regularity in the life-or-death deciding process is delusive.

4. Executive Clemency.

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt-and-degree-determining, and sentencing processes is subject to a final lottery in which the Executive Department has an absolute discretion to spare his life or to permit his execution. The five member Board of Pardons and Paroles[93] has the authority to commute a death sentence, by a majority vote,[94] "except in cases in which the Governor refuses to suspend a sentence of death." Georgia Const., Ann. §2-3011 (1972); Ga. Code Ann. §77-511 (1972). No direction is given to the Governor in the determination whether to suspend sentence, or to the members of the Board in the determination whether to commute a sentence. It is merely provided that the Governor and the Board communicate to the General Assembly each act of

[93] Ga. Code Ann. §77-501 (1972). Appointments to the Board are "made by the Governor and shall be subject to the confirmation of the Senate." Ga. Const. Ann. §2-3011 (1972).

[94] The Georgia Constitution provides that ". . . in all cases a majority shall decide the action of the board." Ga. Constitution Ann. art. V, §2-3011 (1972). Georgia Code Ann. §77-513 (1975 Supp.) provides that "three members of . . . [the Board] may commute a death sentence to life imprisonment." (Ga. Code Ann. §77-511 (1972), which has not been amended since the Board was increased from three to five members in 1973, Ga. Code Ann. §77-501 (1973), provides, inconsistently, that "the board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment.")

clemency and the reasons therefor, Ga. Const. Ann. §2-3011 (1972), and that commutations be made "by a written decision." Ga. Code Ann. §77-513 (1975 Supp.). Courts of the State have "no jurisdiction" to review the arbitrary granting or denial of executive clemency in a death case. *Parks* v. *State*, 206 Ga. 675, 58 S.E.2d 142, 145 (1950).

In the eighteen years between 1946 and 1963, 43 death sentences were commuted in Georgia, while 146 were executed.[95] Thus the ranks of the condemned are further winnowed by the exercise of a power which, albeit merciful, is not and cannot be constrained by any bounds or principles of regularity.

• • •

The system we have just described is not an orderly one, even on paper. Obviously, it will be immeasurably more disorderly in the flesh. Its caprices and irregularities arise in part from the studied purpose of the Georgia legislature to retain an arbitrary discretion in capital sentencing. In another, perhaps preponderate part, they arise from the basic irrationality of the punishment which the system seeks to administer, and from the difficulty of providing for its administration in a society to which it is intolerable except in aberrant and unpredictable cases.[96] In still another part, the disorders of the system are those common to any administration of human justice.

But *this* system is designed to take life. It proposes to take the petitioner's life. Whatever the precise sources of its deficiencies, they cannot be condoned upon the ground that they merely share a common human insufficiency for that purpose. They cannot be condoned on the ground that

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[95] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 192 (1964).

[96] See Part III of the Brief for Petitioner in *Jurek* v. *Texas*, No. 75-5394.

it is difficult to decide whom to kill. The difficulty of the decision is an adequate reason to forbear it. It is not an acceptable reason to make the decision to kill arbitrarily.

Furman v. *Georgia* held, at the very least, that arbitrarily inflicted sentences of death are cruel and unusual punishments. That holding condemns Georgia's present capital sentencing procedures and petitioner Gregg's sentence of death.

III

The Excessive Cruelty of Death

The submissions made in Part III of Petitioner's *Fowler* Brief, at pp. 102-140, and in Part III of the Brief for Petitioner, *Jurek* v. *Texas*, No. 75-5394, are fully applicable to death sentences inflicted under Louisiana law. Petitioner respectfully urges their consideration by the Court.

CONCLUSION

The penalty of death imposed upon petitioner Troy Leon Gregg is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should therefore be reversed insofar as it affirms his death sentence.

Respectfully submitted,

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APPENDIX

APPENDIX

Persons Under Sentence of Death in the State of Georgia*

1. *Roland Tamplin* (black), sentenced to death for murder, September 11, 1975, DeKalb County Super. Ct. *aff'd*, 235 Ga. 20, 218 S.E.2d 779 (1975).
2. *James Spencer* (black), sentenced to death for murder, July 15, 1975, Burke County Super. Ct., No. 1189 *appeal pending*, Sup. Ct. of Georgia, No. 30609.
3. *Billy Birt* (black), sentenced to death for murder, June 19, 1975, Jefferson County Super. Ct. *appeal pending*, Sup. Ct. of Georgia, No. 30638.
4. *Samuel Gibson* (black), sentenced to death for murder, May 15, 1975, Jones County Super. Ct., No. 3835 *appeal pending*, Sup. Ct. of Georgia, No. 30761.
5. *Jill Shaw* (white), sentenced to death for murder, May 14, 1975, Jones County Super. Ct., No. 3835.
6. *Grady Arnold* (black), sentenced to death for murder, May 2, 1975, Fulton County Super. Ct., No. A-26437.
7. *Kenneth Harris* (white), sentenced to death for murder, March 13, 1975, DeKalb County Super. Ct., No. 17784.
8. *William Moore* (black), sentenced to death for murder, February 12, 1975, Jefferson County Super. Ct., No.

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* Transfer of death sentenced prisoners from county jails to the Georgia State Prison at Reidsville is often considerably delayed. This list, which includes inmates housed in the Georgia State Prison at Reidsville and other inmates whose death sentences have come to our attention, may therefore exclude a substantial proportion of the Georgia death row population.

74-6547 *aff'd* 233 Ga. 861, 213 S.E.2d 829 (1975) *pending on petition for certiorari* No. 74-6547.

9. *Guy Mason* (black), sentenced to death for murder, January 22, 1975, Baldwin County Super. Ct., No. 28447 *aff'd* No. 30338, Sup. Ct. of Georgia, December 2, 1975 (slip opinion).

10. *Michael Berryhill* (white), sentenced to death for murder, January 9, 1975, Bartow County Super. Ct., No. 32699 *appeal pending,* Sup. Ct. of Georgia, No. 30173.

11. *George Street* (black), sentenced to death for murder, January 8, 1975, Pierce County Super. Ct., No. 617 *appeal pending,* Sup. Ct. of Georgia, No. 30644.

12. *Alpha O. Stephens* (black), sentenced to death for murder, November 17, 1974, Bleckley County Super. Ct. No. 6713.

13. *Curfew Davis* (black), sentenced to death for murder, November 12, 1974, Troup County Super. Ct., No. 124-620 *appeal pending,* Sup. Ct. of Georgia, No. 30636.

14. *William Mitchell* (black), sentenced to death for murder, November 5, 1974, Worth County Super. Ct., No. *aff'd* 234 Ga. 160, 214 S.E.2d 900 (1975) *pending on petition for certiorari,* No. 75-5022.

15. *Ehrlich Coker* (white), sentenced to death for rape, October 18, 1974, Ware County Super. Ct., No. 5097 *aff'd* 234 Ga. 555, 216 S.E.2d 782 (1975) *pending on petition for certiorari,* No. 75-5444.

16. *Marcus Chenault* (black), sentenced to death for murder, September 12, 1974, Fulton County Super. Ct., No. A22379 *aff'd* 234 Ga. 216, 215 S.E.2d 223 (1975).

17. *Willie Dobbs* (black), sentenced to death for murder, May 22, 1974, Walker County Super. Ct., No. 8403 *appeal pending,* Sup. Ct. of Georgia, No. 30453.

18. *Timothy McCorquodale* (white), sentenced to death for murder, April 21, 1974, Fulton County Super. Ct., No. A-20205 *aff'd* 233 Ga. 369, 211 S.E.2d 570 (1974) *pending on petition for certiorari,* No. 74-6557.

19. *Gary Floyd* (white), sentenced to death for murder, April 10, 1974, Fulton County Super. Ct., No. A-19628 *aff'd* 233 Ga. 280, 210 S.E.2d 810 (1974).

20. *David Jarrell* (white), sentenced to death for murder and kidnapping, March 14, 1974, Gwinnett County Super. Ct., No. 95107 *aff'd* 234 Ga. 410, 216 S.E.2d 258 (1975) *pending on petition for certiorari,* No. 74-6736.

21. *Willie Ross* (black), sentenced to death for murder, March 13, 1974, Colquitt County Super. Ct., No. 51-71 *aff'd* 233 Ga. 561, 211 S.E.2d 356 (1974).

22. *Troy Gregg* (white), sentenced to death for murder, February 8, 1974, Gwinnett County Super. Ct., No. 9489 *aff'd* 233 Ga. 117, 210 S.E.2d 659 (1974) *cert. granted* 44 U.S.L.W. 3439, January 22, 1976.

23. *Wayne Coleman* (white), sentenced to death for murder, January 18, 1974, Seminole County Super. Ct., No. 439.

24. *George Dungee* (black), sentenced to death for murder, January 9, 1974, Seminole County Super Ct., No. 444.

25. *Carl Isaacs* (white), sentenced to death for murder, January 3, 1974, Seminole County Super. Ct., No. 449.

26. *John Eberheart* (black), sentenced to death for rape and kidnapping, December 2, 1973, Cook County Super. Ct., No. 28776, *aff'd* 232 Ga. 247, 206 S.E.2d 12 (1974), *pending on petition for certiorari,* No. 74-5154.

27. *Jack House* (white), sentenced to death for murder, July 11, 1973, Fulton County Super. Ct., No. CA-16814, *aff'd* 232 Ga. 140, 205 S.E.2d 217 (1974), *pending on petition for certiorari,* No. 74-5196.

28. *John Hooks* (black), sentenced to death for rape, December 10, 1973, Cook County Super. Ct., No. 9859, *aff'd* 233 Ga. 117, 210 S.E.2d 668 (1974), *pending on petition for certiorari,* No. 9859.